Supreme Court, U.S.
FILED
DEC 15 1998
OFFICE OF THE CLERK

No. 98-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE ATEEQ,
Petitioner,

vs.

ELIA NAJOR, RANGER INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARLOS E. SOSA
Counsel of Record

LARRY D. STRATTON

HAUSMAN, SOSA & HUDSON, LLP

16633 Ventura Boulevard, Suite 1220
Encino, California 91436-1839
(818) 789-5100

Attorneys for Respondent
RANGER INSURANCE COMPANY

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (949) 720-1510

No. 98-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE ATEEQ,
Petitioner,

vs.

ELIA NAJOR, RANGER INSURANCE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARLOS E. SOSA
Counsel of Record

LARRY D. STRATTON

HAUSMAN, SOSA & HUDSON, LLP

16633 Ventura Boulevard, Suite 1220
Encino, California 91436-1839
(818) 789-5100

Attorneys for Respondent
RANGER INSURANCE COMPANY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATUTES AND OTHER AUTHORITIES v

I JURISDICTION 1

II STATUTES AND CONSTITUTIONAL PROVISIONS 1

III QUESTIONS PRESENTED 4

IV INTRODUCTORY STATEMENT 5

V STATEMENT OF THE CASE 6

A Ranger's Issuance of the State Court Appeal Bond 6

B Najor's Chapter 11 Bankruptcy Petition 7

C Najor's Turnover Motion 7

D Ateeq's 1995 Attack Upon the 1993 Order 10

E Proceedings Before the Lower Appellate Courts 11

VI THE PETITION MAKES NUMEROUS MISSTATEMENTS OF FACT AND LAW 12

TABLE OF CONTENTS CONTINUED

PAGE

VII REASONS FOR DENYING THE WRIT 15

A Ateeq Inaccurately Claims That He Had No Prior Notice That Najor Sought Bond Exoneration 15

B The 1992-1993 Proceeding Before the Bankruptcy Court Was a Core Proceeding Given the Proven Nexus Between Ranger's Collateral and the Turnover Order 16

C In Any Event, There Was "Related To" Jurisdiction to Which Ateeq Consented 19

VIII CONCLUSION 21

APPENDIX

A Notice of Motion and Motion by Debtor-in-possession Elia Najor for Turnover of Property [11 U.S.C. Section 542] A-1

B Order Granting Debtor-in-possession's Motion for Turnover of Property and Cancellation of Bond B-1

C Declaration of Frances V. Trevino in Opposition to Motion to Set Aside Order C-1

TABLE OF AUTHORITIES

PAGE

In re Grewe,
4 F.3d 299 (4th Cir. 1993), cert. denied, 114 S.Ct. 1056 (1994) 20

Abramowitz v. Palmer,
999 F.2d 1274 (8th Cir. 1993) 20

Celotex Corp. v. Edwards,
514 U.S. 300, 131 L.Ed.2d 403, 115 S.Ct. 1493(1995) 6,19

In re Brickell Investment,
922 F.2d 696 (11th Cir. 1991) 20, 20

In re Careau Group,
923 F.2d 710 (9th Cir. 1991) 18

In re Daniels-Head & Assoc.,
819 F.2d 914 (9th Cir. 1987) 20

In re Mann,
907 F.2d 923 (9th Cir. 1990) 15, 19, 20

In re Men's Sportswear,
834 F.2d 1134 (2nd Cir. 1987) 21

In re Southern Industrial Banking,
809 F.2d 329 (6th Cir. 1987) 20

In re Yochum,
89 F.3d 661 (9th Cir. 1996) 20

TABLE OF AUTHORITIES CONTINUED

PAGE

United States v. Booth Tow Services,
64 Bankr. 539 (W.D. Mo. 1985) 17

STATUTES AND OTHER AUTHORITIES

PAGE

11 U.S.C. §361 ..... 2, 17
11 U.S.C. §363 ..... 3, 17

2 Collier on Bankruptcy 15 §361.01 [361-6] (1996) ... 18

28 U.S.C. §157 ..... 1, 2, 5, 11, 16
28 U.S.C. §157(b)(2)(A) 16, 17
28 U.S.C. §157(b)(2)(E) 16, 17, 19
28 U.S.C. §157(b)(2)(K) 17, 18
28 U.S.C. §157(b)(2)(O) 17, 18

Equal Access to Justice Act, 26 U.S.C. §7430 20

Federal Rules of Bankruptcy Procedure 8002 4

Rules of the Supreme Court, Rule 14(4) 16

I
JURISDICTION

The respondent Ranger Insurance Company ("RANGER") does not contest jurisdiction over this Petition under 28 U.S.C. §1254(1).

II
STATUTES AND CONSTITUTIONAL PROVISIONS

RANGER disputes the Petitioner regarding the pertinent provisions of 28 U.S.C. §157. The applicable portions of 28 U.S.C. §157 are as follows:

> (2) Core proceedings include, but are not limited to -
>
> (A) matters concerning the administration of the estate;
>
> . . .
>
> (E) orders to turn over property of the state;
>
> . . .
>
> (K) determinations of the validity, extent, or priority of liens;
>
> . . .
>
> (M) orders approving the use or lease of property, including the use of cash collateral;

. . .

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

11 U.S.C. §361 provides, in pertinent part:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by -
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
>
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
>
> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable

equivalent of such entity's interest in such property.

11 U.S.C. §363 provides in pertinent part:

> (a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.
>
> . . .
>
> (c)(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless --
>
> (A) each entity that has an interest in such cash collateral consents; or
>
> (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.
>
> . . .

> (e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Rule 8002 of the Federal Rules of Bankruptcy Procedure ("FRBP") provides in pertinent part:

> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order or decree appealed from.

III
QUESTIONS PRESENTED

Given the Petitioner's failure to properly identify the issues in this petition, RANGER submits the following:

1. Did the Bankruptcy Court act within its jurisdiction in issuing the turnover order of January 5, 1993?

2. Did the Bankruptcy Court exercise "core" jurisdiction in issuing the January 5, 1993 order, including the bond exoneration aspect?

3. Alternatively, did the petitioner consent to the court exercising "related to" jurisdiction in its issuance of the January 5, 1993 order?

4. Did the Bankruptcy Court act within its proper discretion in denying the Petitioner's Rule 60(b) motion?

IV
INTRODUCTORY STATEMENT

This Petition is based upon numerous "straw man" arguments. GEORGE ATEEQ ("ATEEQ") seeks to set aside a 1993 Bankruptcy Court order which, among other things, exonerated a state court appeal bond written by RANGER. However, ATEEQ is overly narrow in his issue specification: he claims the issue is whether a bankruptcy judge may constitutionally hear and determine this action as a "related to" proceeding, under 28 U.S.C. §157.

But the Ninth Circuit Court of Appeal focused upon other matters. ATEEQ failed to appeal the adverse 1993 order, failing to pursue any attack of the order until nearly three years after entry. The Bankruptcy Court entered its order on January 5, 1993, but ATEEQ failed to file his motion for relief under Federal Rule of Civil Procedure 60(b) until late 1995.

During this nearly three year interim, RANGER relied upon and complied with the Bankruptcy Court's 1993 order by releasing collateral of $300,000 plus a security interest in 29 acres of real property, as required by the order. ATEEQ understandably ignored this inconvenient fact in his Petition, also forgetting that if the January 5, 1993 order were now vacated, RANGER would be severely prejudiced. ATEEQ's essential claim is that the Bankruptcy Court lacked jurisdiction to make the January 5, 1993 order. However, as noted by the Ninth Circuit, ATEEQ consented to the Bankruptcy Court's jurisdiction. *Memo. Dec. at 4.*[1]

---

[1] The Petition for Certiorari is cited as "Pet. ___." The Appendices to the Petition are cited as "Pet. App. __." The Appendix to this Brief in (continued...)

ATEEQ's petition is ripe for denial. He not only fails to accurately address the facts, but he fails to show any compelling reason for relief. Under the directly analogous *Celotex Corp. v. Edwards, 514 U.S. 300, 131 L.Ed.2d 403, 115 S.Ct. 1493 (1995)*, this Court has already ruled that Bankruptcy Court jurisdiction is "at least" non-core.

In his petition, ATEEQ introduced misstatements and matters outside of the trial court and appellate record, necessitating the following factual discussion.

V
STATEMENT OF THE CASE

A Ranger's Issuance of the State Court Appeal Bond

ATEEQ was a plaintiff, and a cross-defendant, in an action pending before the Superior Court for San Diego County, California, entitled *George Ateeq v. Elia Najor, Case No. 599758*. In that action ATEEQ sought general and punitive damages against defendant, ELIA NAJOR ("NAJOR"). The lawsuit resulted in an April 16, 1991 judgment, awarding ATEEQ a total judgment of $404,056 against NAJOR. NAJOR timely appealed the judgment to the California Court of Appeal.

NAJOR, thereafter, applied to RANGER for an appeal bond, to stay ATEEQ's further enforcement of the judgment pending the appeal. RANGER ultimately issued an appeal bond on about April 12, 1994 for $674,000, naming NAJOR

---

[1] (...continued)
Opposition is cited as "App. __." The Ninth Circuit's unpublished Memorandum of Decision is cited as "Memo. Dec. ___." The Excerpts of Record on file with the Ninth Circuit are cited as "ER __."

as the bond principal, and ATEEQ as the obligee. This bond stayed further enforcement of the judgment pending the state court appeal.

As a condition precedent to RANGER's issuance of the bond, RANGER required that ATEEQ post collateral with RANGER; RANGER also required that ATEEQ execute an indemnity agreement. ATEEQ met these conditions, posting with RANGER collateral consisting of (1) an irrevocable letter of credit issued by First Western Bank in the amount of $300,000, naming RANGER as beneficiary;[2] (2) a security agreement entitled a "Collateral Receipt and Agreement" in the amount of $374,000 against real property, consisting of 29 acres of land in Victorville, California; and (3) a "Short Form Deed of Trust and Assignment of Rents" against the same 29 acres of land in Victorville, California, naming RANGER as beneficiary. As RANGER's representative testified in a Bankruptcy Court declaration, "[b]ut for the deposit of collateral in this case, RANGER would not have written the bond." *App. at C5.*

B Najor's Chapter 11 Bankruptcy Petition

On about July 27, 1992, NAJOR filed a voluntary petition with the United States Bankruptcy Court, Southern District of California, under Chapter 11.

C Najor's Turnover Motion

On about November 19, 1992, NAJOR filed a "motion for turnover of property" with the Bankruptcy Court. The motion sought turnover of the collateral to the bankruptcy

---

[2] RANGER later demanded a full draw down on the $300,000 letter of credit, retaining the proceeds as collateral, minus bond premium.

estate, to pay "ongoing administrative expenses, to make adequate protection payments and to otherwise reorganize his financial affairs." *App. at A2.* Contrary to ATEEQ's present assertion that there was "*no mention* in the Notice [of motion] of the *release of liability* of Ranger" [emphasis in original] *[Pet. at 6]*, the Notice of Motion in fact stated there would be a "hearing regarding the Debtor-in-Possession's motion for turnover of the collateral supporting the undertaking obtained by NAJOR with respect to the appeal of the judgment in *Ateeq v. Najor*, San Diego Superior Court Case No. 599758 *and for cancellation of the undertaking*." [Emphasis added] *App. at A1.*

In addition to this statement in the notice of motion, NAJOR's supporting points and authorities argued for cancellation of the bond. NAJOR urged the Bankruptcy Court "issue an order canceling the undertaking." *ER at 46.* Similarly, NAJOR's counsel addressed the nexus between the release of RANGER's collateral and the need for bond exoneration. The declaration supporting NAJOR's motion argued that "[b]ased on the collateral which NAJOR and his wife posted for the undertaking, on April 12, 1991, Ranger Insurance Company issued an undertaking in the sum of $675,000.00." *ER at 51.*

ATEEQ's opposition papers also reflected his counsel's understanding that NAJOR's motion sought bond exoneration. ATEEQ specifically opposed cancellation of RANGER's undertaking. For example, ATEEQ argued that NAJOR "has not cited nor has Mr. Ateeq found any case permitting the cancellation of an undertaking once the bond has been posted by the surety." *ER at 81.* Moreover, ATEEQ's counsel argued against bond exoneration during oral argument of that motion.

The Bankruptcy Court rejected ATEEQ's argument, and on January 5, 1993 ordered turnover of property and cancellation of the bond. The court ordered, *inter alia*, that the "collateral which NAJOR posted for the bond shall be turned over to the bankruptcy estate . . ." and that RANGER "is released from all liability in connection with the bond and the Collateral Receipt Agreements for the $300,000.00 and the 29 acres dated April 11, 1992 . . ." *App. at B2-B3 (¶3)*. The Bankruptcy Court ordered that RANGER return the entire $300,000, including the premium which was previously deducted. *App. at B2 (¶2(a))*.

ATEEQ's counsel approved the proposed turnover order arising out of this ruling "as to form." That proposed order was to be executed by the Bankruptcy Court judge. *App. at B3*. ATEEQ thus agreed to this dispositive order being made by the Bankruptcy Court judge, a fact evident from the form of the order. On January 5, 1993 the Bankruptcy Court entered the turnover and bond exoneration order. *App. at B1-B3; Pet. App. at B3 (Finding 14)*. ATEEQ never appealed that order. *See Pet.App. at B4 (Finding 16)*. ATEEQ had a ten (10) day period to file a notice of appeal. *FRBP 8002*.

RANGER complied with the order, releasing the collateral. As RANGER's representative declared, RANGER "returned the collateral in compliance with the court's order." Moreover, "had RANGER been aware of any future attack by Mr. Ateeq [upon the January 5, 1993 order] RANGER would not have acted as it did." Moreover, "had RANGER known that Mr. Ateeq had intended to attack the aspect of the order exonerating the bond, RANGER would have sought to stay the aspect of the order requiring the return of collateral until the bond liability issues were finally resolved." [Emphasis in original] *App. at C4-C5 (Trevino Declaration)*.

D Ateeq's 1995 Attack Upon the 1993 Order

ATEEQ's first direct attack upon the January 5, 1993 order came nearly three years later. In late 1995, ATEEQ filed a motion to set aside the order, and sought relief under Federal Rule of Civil Procedure 60(b). ATEEQ sought to set aside the aspect of the 1993 order canceling the bond. For the first time in that motion, ATEEQ made new assertions, including a claim that the Bankruptcy Court was without jurisdiction in entering the January 5, 1993 order. ATEEQ also asserted that RANGER did not have a "valid" interest in the 29 acres of real property posted as collateral. ATEEQ claimed, for example, that the deed of trust was not properly executed. *Pet. at 4, n.1.* ATEEQ did not make the claim three years earlier, in his opposition to the 1992-93 turnover motion.[3]

ATEEQ also asserts in the present Petition that the letter of credit was not an asset of the estate. *Pet. at 5, n.2.* ATEEQ, however, did not make this argument until he reached the appellate level, following the Bankruptcy Court's 1995 denial of his 1995 set aside motion.[4] Notwithstanding

---

[3] Even then, ATEEQ's "evidence" that the trust deed inaccurately described the real property was a declaration by ATEEQ's new counsel, allegedly memorializing conversations and/or a "fax" from a "customer service representative" of a title insurer. *ER at 156.*

[4] Before the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") and the Ninth Circuit, RANGER argued that while the letter of credit may or may not have been an asset of the estate, the collateral posted with the issuing bank to secure the letter of credit (which NAJOR almost certainly posted) *was* estate property. This issue was never originally raised by ATEEQ, however. ATEEQ did not raise this "issue" in the Bankruptcy Court. The issue is res judicata through ATEEQ's failure to appeal a now final January 5, 1993 order. Moreover, the Bankruptcy Court factually found the cash to

(continued...)

these arguments, the Bankruptcy Court factually found that these assets constituted collateral, to which the estate had a claim in the turnover proceeding. *Pet.App. at B2-B4.*

The Bankruptcy Court denied ATEEQ's motion seeking to set aside the order exonerating the bond. In the Findings of Fact and Conclusions of Law, the Bankruptcy Court found that it had "core" jurisdiction under 28 U.S.C. §157 to issue the 1993 turnover order. *Pet. App. at B4. (Finding 19).* Alternatively, the Court found that it had "related to" jurisdiction, and that ATEEQ had consented to jurisdiction. *Id. at B4 (Finding 18).* The Bankruptcy Court alternatively found that it had supplemental jurisdiction over ATEEQ.

Moreover, the Bankruptcy Court found that the security posted by NAJOR, the debtor, was recorded as an inducement to issue the bond, and that "[b]ut for Ranger's receipt of the collateral, Ranger would not have issued the bond to Najor." *Id. at B3 (Finding 9).*

E Proceedings Before the Lower Appellate Courts

ATEEQ appealed the denial of his Rule 60(b) motion to the Ninth Circuit BAP. The BAP affirmed the Bankruptcy Court, determining that the Bankruptcy Court's jurisdiction in the 1993 proceeding "rose *at least* to the level of 'related to' jurisdiction . . ." [Emphasis added] *ER at 202-03 (BAP Memorandum Decision).* The BAP also found that ATEEQ consented to Bankruptcy Court jurisdiction, and that supplemental jurisdiction may also exist. The BAP also noted

---

[4] (...continued)
be an asset of the estate. *Pet.App. at B3 (¶8).* It is the fault of ATEEQ if he failed to fully litigate this matter.

ATEEQ's failure to appeal, and that "there was no real explanation for the nearly three year delay in bringing the motion to vacate." *ER at 205.* The BAP affirmed the Bankruptcy Court.

ATEEQ thereafter appealed to the Ninth Circuit. The Ninth Circuit affirmed the BAP's decision. *Memo. Dec. at 1 et seq.* The Ninth Circuit also denied ATEEQ's Petition for rehearing.

VI
THE PETITION MAKES NUMEROUS MISSTATEMENTS OF FACT AND LAW

Throughout this litigation before the Bankruptcy Court, the BAP, and the Ninth Circuit Court of Appeal, ATEEQ has failed to accurately address the pertinent issues. For example, ATEEQ ignores the obvious prejudice to RANGER if the Bankruptcy Court's order turnover of property and "cancellation of bond" entered January 5, 1993 were reversed. ATEEQ ignores the plain fact that RANGER was compelled to comply with the Bankruptcy Court's order by returning the collateral to the estate, and that any reversal of the January 5, 1995 order would unalterably prejudice RANGER as a result.

RANGER disputes ATEEQ's factual statement through reasons which include the following:

1. ATEEQ repeatedly asserts that NAJOR's 1993 turnover motion did not give notice that RANGER's bond would be "released" from liability. *See, e.g., Pet. at 6, 7.* This claim is false. NAJOR's notice and moving papers gave specific notice that NAJOR sought bond exoneration. *See App. at A2; see also ER at 39, 40, 46, 47.*

The reporter's transcript of the 1993 proceedings showed that ATEEQ's counsel, Mr. Schmidt, understood that bond exoneration was being litigated at that hearing. For example, Mr. Schmidt argued that while he had no problem with the turnover of collateral, he disputed "the court telling [Ranger] Insurance Company they [no] longer have to have the bond posted." *ER at 122:2-4. See also ER at 123-128.*

2. ATEEQ never attacked or questioned Bankruptcy Court jurisdiction during the 1992-93 proceeding, although he now argues that he previously objected to the motion as being "not proper." *Pet. at 8.* What is meant by "not proper" is not explained. Plainly, ATEEQ never disputed Bankruptcy Court jurisdiction. ATEEQ's vague argument implicitly acknowledges that he never disputed Bankruptcy Court jurisdiction in that earlier hearing.

3. ATEEQ claims that he did not expressly submit to the Bankruptcy Court's "related to" jurisdiction; that the cause was never adjudicated by the District Court. *Pet. at 17-19.* However, not only did ATEEQ participate in the proceeding, failing to raise any jurisdictional issue, but he expressly agreed to the "form" of the final order which specifically designated the issuing judge as "the Honorable John J. Hargrove, U.S. Bankruptcy Court Judge." *App. at B3.* The order is nothing less than a final order. ATEEQ consented to jurisdiction.

4. The Bankruptcy Court specifically and factually found the nexus between the collateral posted by NAJOR with RANGER, and RANGER's issuance of the bond. This finding is within the "Findings of Fact and

Conclusions of Law." *Pet. App. at B1 et seq.*[5] The court found the letter of credit and real property collateral acted as "consideration" for the bond's issuance. *Pet. App. at B2-B3 (Findings 6 and 7). See also, Pet. App. at B3 (Finding 9) (bond issuance dependent upon RANGER's receipt of collateral).*

5. ATEEQ effectively ignores the link between the collateral and RANGER's issuance of the $674,000 appeal bond. ATEEQ makes the unsubstantiated claim that its collateral was not *really* a part of the bankruptcy estate, or alternatively that RANGER was not fully secured. *Pet. at 6.* However, again, ATEEQ ignores the Bankruptcy Court's factual findings that RANGER "had a security interest" in the property, and that RANGER relied upon receipt of the collateral when issuing the bond. *Pet. App. at B3-B4 (Findings 8, 9, 10, 15).*[6]

---

[5] ATEEQ argues that the Bankruptcy Court mindlessly adopted RANGER's findings. *Pet. at 9.* Presumably, ATEEQ would not have insulted the Bankruptcy Court in this fashion had that court agreed with *his* position.

[6] ATEEQ lectures NAJOR in the Petition, arguing that NAJOR "should have" sought to remove the state court case and should have sought abstention. *Pet. at 6, n.4.* This legal advice is bizarre in light of the fact that this entire proceeding is ATEEQ's attempt to shift responsibility upon RANGER for a situation *he* created.

Even now, ATEEQ's effort to blame others continues. ATEEQ filed a separate state court action against RANGER entitled *Ateeq v. Ranger Insurance Company*, case no. 701607 (San Diego Superior Court), alleging that RANGER committed "bad faith" in failing to pay ATEEQ the cancelled bond. ATEEQ has thus far failed to convince any state court that RANGER is at fault for complying with a Bankruptcy Court order. ATEEQ appealed an adverse trial court judgment to the California Court of Appeal (case no. D027820), where the case is now pending.

6. ATEEQ's failure to timely attack the January 5, 1993 order foreclosed RANGER from seeking relief from that order, which directed that RANGER "shall" turn over the collateral posted for the bond over to the Bankruptcy estate.

7. ATEEQ asserted that the Bankruptcy Court "*did not* find 'non-core, related to' jurisdiction." [Emphasis in original] *Pet. at 18.* This distorts the Bankruptcy Court's findings, because the Bankruptcy Court found that ATEEQ consented to Bankruptcy Court jurisdiction, as in the case *In re Mann, 907 F.2d 923 (9th Cir. 1990). See Pet. App. at B4 (Finding 18). In re Mann* was a non-core case. Thus, contrary to ATEEQ's assertion, the Bankruptcy Court *did* find non-core jurisdiction through its adoption of the *In re Mann* holding.

VII
REASONS FOR DENYING THE WRIT

ATEEQ's jurisdictional arguments have been disregarded by *three* lower courts. First, the Bankruptcy Court made not only legal determinations but also *factual* determinations contrary to ATEEQ's position. Both the BAP and the Ninth Circuit have rejected ATEEQ's jurisdictional argument. RANGER addresses some of the bases for denying this writ in the following paragraphs.

A Ateeq Inaccurately Claims That He Had No Prior Notice That Najor Sought Bond Exoneration

ATEEQ's application is replete with misstatements, and failures to disclose significant matters to this Court. As stated in the Rules, a petitioner's failure to present with accuracy "whatever is essential to ready and adequate

understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." *Rules of the Supreme Court ("Rules"), Rule 14(4).*

Repeatedly, ATEEQ asserts that NAJOR's 1992-93 turnover motion did not include any "mention" of a "release of liability" of RANGER. *Pet. at 6.* Apparently in an effort to raise due process concerns, ATEEQ argues in his petition that "nowhere in the moving papers did Najor give notice or request that Ranger be *released* from all liability under the bond." *Pet. at 7.*

The Petitioner is playing semantical games. Because the original turnover motion papers called for "cancellation of the undertaking," ATEEQ's premise is false. Moreover, ATEEQ's counsel during the 1992 hearing on the turnover motion clearly understood the nature of the hearing, and the nature of the relief NAJOR sought.

B The 1992-1993 Proceeding Before the Bankruptcy Court Was a Core Proceeding Given the Proven Nexus Between Ranger's Collateral and the Turnover Order

ATEEQ asserts but fails to demonstrate that the 1992-1993 Bankruptcy Court proceeding was not core. ATEEQ argues that the turnover proceeding (relating to bond exoneration) was "not based on any right created by the Federal Bankruptcy Law; it was based solely on state-created rights . . ." *Pet. at 17.* This, however, begs the issue.

In enacting the legislation ultimately codified as 28 U.S.C. §157, Congress broadly interpreted those matters deemed "core." As stated in 28 U.S.C. §157, core proceedings include "*but are not limited to*" "(A) matters concerning the administration of the estate; . . . (E) orders to

turnover property of the estate; . . . [and] (K) determinations of the validity, extent, or priority of liens." [Emphasis added] *28 U.S.C. §157(b)(2)(A), (E), and (K)*. In addition, "core" proceedings include those "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship." *28 U.S.C. §157(b)(2)(O)*.

Notwithstanding ATEEQ's assertions, NAJOR's motion for turnover addressed matters related to the "administration of the estate." *28 U.S.C. §157(b)(2)(A)*. NAJOR identified the primary purpose for his motion as the need for assets, for reorganization purposes. As NAJOR stated in his original motion, the $300,000 cash collateral and other property RANGER held was required "to pay ongoing administrative expenses, to make adequate protection payments and to otherwise reorganize [NAJOR's] financial affairs." *App. at A2*. This aspect of the order was also "core" because it dealt with property of the estate. Core proceedings also include "orders to turnover property of the estate." *28 U.S.C. §157(b)(2)(E)*.

Additionally, RANGER held a security interest in the collateral. RANGER held a security interest in the $300,000 cash, and an interest in the lien on the 29 acres of land located in Victorville, California. RANGER thus had a due process right -- even an "adequate protection" right -- to have its security interests protected. *See generally, 11 U.S.C. §§ 361, 363*. Providing for the adequate protection of RANGER's security interest is required, and mandatory. The adequate protection doctrine exists to prevent impairment of a secured creditor's secured position. *See United States v. Booth Tow Services, 64 Bankr. 539 (W.D. Mo. 1985)*. Adequate protection is mandated in the Code "when requested by an appropriate entity as a matter of right and not as a matter of

discretion." *2 Collier on Bankruptcy 15 §361.01 [361-6] (1996).*

Throughout these proceedings, ATEEQ has attempted to dissect the January 5, 1993 order into two elements: a "turnover" component and a "release of bond" component. In the prior proceedings, ATEEQ even suggested -- oblivious to the doctrine of federal preemption -- that the Bankruptcy Court somehow erred in allegedly failing to follow California's procedures for canceling or releasing sureties. This flawed position has evolved into ATEEQ's present argument that the Bankruptcy Court dealt with "state-created rights" and that the order was "contrary to a specific set of statutes designed to prevent exactly what happened here . . ." *Pet. at 17.* Obviously, the Supremacy Clause gives the federal bankruptcy courts plenary power over matters embraced in the bankruptcy statutes. *See In re Careau Group, 923 F.2d 710, 711-12 (9th Cir. 1991).*

Yet, ATEEQ's claim that the turnover motion was not a core proceeding cannot be correct. The Bankruptcy Court made a specific *factual* finding that RANGER would not have issued the bond but for the security *[Pet. App. at B3 (Finding 9)]* and that the collateral constituted "security" to which RANGER had a property right. *Pet. App. at B3 (Findings 10, 15).* Thus, ATEEQ's argument is not only contrary to the explicit factual findings of the Bankruptcy Court, but the inherent link between the collateral and the bond brings the issue into the Bankruptcy Court's core jurisdiction. Not only does the Bankruptcy Court's "core" jurisdiction pertain to the determinations "of the validity, extent, a priority of liens" but also to the adjustment of the debtor-creditor relationship or the debtor's relationship with "equity security holder[s]." *28 U.S.C. §157(b)(2)(K), (O).*

But for the turnover motion,[7] RANGER's collateral would not have been at risk. The fact that NAJOR sought turnover generated the possibility of an uncompensated loss of RANGER's secured position. Thus, turnover and bond exoneration were inexorably linked, and if the turnover aspect of the 1993 order constituted a core proceeding, so must the bond exoneration aspect of that order.

Moreover, bankruptcy court jurisdiction is more broadly interpreted in a Chapter 11 case, such as this one. In a strongly analogous case, this Court held that an execution upon a state court supersedeas bond was "*at least* 'related to'" [emphasis added] the bankruptcy of the bond principal. *Celotex Corp. v. Edwards, 514 U.S. 300, 309, 131 L.Ed.2d 403, 115 S.Ct. 1493, 1500 (1995).* The jurisdiction of Bankruptcy Courts extend more broadly in a Chapter 11 reorganization than in the case of a Chapter 7 liquidation. *Id. at 310.*

C In Any Event, There Was "Related To" Jurisdiction to Which Ateeq Consented

ATEEQ essentially concedes the existence of "related to" jurisdiction. However, ATEEQ argues that the Bankruptcy Court was without jurisdiction to enter the order absent ATEEQ's express consent; that under the statute, only the District Court had the authority to enter such an order. *See Pet. at 18 et seq.*

However, ATEEQ's claim that he did not expressly consent is simply untrue. ATEEQ's claim is contradicted by his conduct at the time of the hearing. As stated in *In re Mann,* a non-core proceeding, the failure to object to court

---

[7] By definition, turnover is a "core" matter. *28 U.S.C. §157(b)(2)(E).*

jurisdiction constitutes consent. *In re Mann, 907 F.2d at 925-26; In re Daniels-Head & Assoc., 819 F.2d 914, 918 (9th Cir. 1987).* ATEEQ incorrectly assumes that express consent may only be conferred through a written document or by a specific affirmation. However, this is wrong. For example, in *In re Southern Industrial Banking, 809 F.2d 329, 331 (6th Cir. 1987),* affirmative acts constituted the consent required to confer jurisdiction in a non-core case. *Id. at 331.* Throughout the 1992-1993 proceeding, ATEEQ fully consented to the proceeding. ATEEQ also allowed RANGER to rely upon the order. RANGER released the collateral pursuant to the January 1993 order; RANGER will *never* be able to retrieve its secured position if the order is set aside.

ATEEQ also asserts a conflict between circuits, claiming that *In re Brickell Investment, 922 F.2d 696 (11th Cir. 1991) ("Brickell")* conflicts with the Ninth Circuit on the issue of consent by conduct in non-core cases. However, *Brickell* involved a fee award against the Internal Revenue Service ("IRS") where the IRS' alleged "consent" to bankruptcy court jurisdiction was their filing of a proof of claim. Moreover, *Brickell,* a case which has been frequently questioned and criticized by other Circuit decisions, based its holding upon an interpretation of the Equal Access to Justice Act, 26 U.S.C. §7430.[8]

Nevertheless, numerous courts agree that consent may be implied from conduct of the parties. *See e.g., Abramowitz v. Palmer, 999 F.2d 1274, 1280 (8th Cir. 1993).* The failure to object to a Bankruptcy Court's assumption of core

---

[8] *See, e.g., In re Grewe, 4 F.3d 299, 300 (4th Cir. 1993), cert. denied, 114 S.Ct. 1056 (1994)* (contrary to *In re Brickell,* the Bankruptcy Court is a "court of the United States" within the meaning of the EAJA). *See also In re Yochum, 89 F.3d 661, 665-68 (9th Cir. 1996).*

jurisdiction constitutes "consent" and permits the Bankruptcy Court to enter the order or judgment. *In re Men's Sportswear, 834 F.2d 1134, 1137-38 (2nd Cir. 1987).* An objection after such consent "more closely resembles an afterthought than a bona fide objection." *Id. at 1138.*

In any event, ATEEQ in fact expressly consented to jurisdiction. He approved the form of the proposed turnover order. *App. at B3.* ATEEQ could have objected to the form of the order by (for example) insisting that it be only a recommendation to the District Court Judge and not a final order. ATEEQ could have refused to sign it. However, ATEEQ expressly approved the final order, allowing its execution by Judge Hargrove, Bankruptcy Court Judge. Under any interpretation, ATEEQ expressly consented to bankruptcy court jurisdiction.

VIII
CONCLUSION

Based on the foregoing, RANGER requests that the petition be summarily denied.

Respectfully submitted,

Counsel of Record
CARLOS E. SOSA
LARRY D. STRATTON

LAW OFFICES OF
HAUSMAN, SOSA & HUDSON, LLP

Attorneys for: Respondent,
Ranger Insurance Company

APPENDIX A

Brian P. Ballo, Esq., #134892
LAW OFFICES OF BRIAN P. BALLO
12702 Via Cortina, Suite 100
Del Mar, California 92014
(619) 259-5500

Attorney for Debtor-In-Possession
ELIA NAJOR

FILED
Clerk, U.S. Bankruptcy Court
NOV 19, 1992
Southern District of California

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: Elia Najor, aka Louie Najor, aka Elia M. Najor, Debtor-In-Possession	Case 92-08844 H 11 NOTICE OF MOTION AND MOTION BY DEBTOR-IN-POSSESSION ELIA NAJOR FOR TURNOVER OF PROPERTY [11 U.S.C. Section 542] DATE: December 17, 1992 TIME: 10:00 a.m. DEPT: Three

TO THE UNITED STATES TRUSTEE, CREDITOR GEORGE ATEEQ, HIS ATTORNEYS DONALD SCHMIDT AND JENNIFER HASSO-NAJM, DOUGLASS FINANCIAL CORPORATION, RANGER INSURANCE COMPANY, GROSSONT BANK, AND THOSE PARTIES FILING REQUEST FOR SPECIAL NOTICE:

YOU ARE HEREBY NOTIFIED that on December 17, 1992 at 10:00 a.m. in Department Three of the United States Bankruptcy Court located at 940 Front Street, Fifth Floor, San Diego, California 92189, there will be a hearing regarding the Debtor-in-Possession's Motion for turnover of the collateral supporting the undertaking obtained by NAJOR with respect to the appeal of the judgment in *Ateeq v. Najor*, San Diego Superior Court Case No. 599758 and for cancellation of the undertaking.

The motion will be pursuant to 11 U.S.C. § 542 on grounds that

(1) the undertaking is no longer necessary given that plaintiff George Ateeq is an unsecured creditor who is prevented from executing on his judgment by virtue of the automatic stay (11 U.S.C. §362(a));

(2) George Ateeq has no security interest in the collateral securing the undertaking on appeal; and,

(3) NAJOR needs the $300,000 cash and the property he posted as collateral for the undertaking to pay ongoing administrative expenses, to make adequate protection payments and to otherwise reorganize his financial affairs.

This motion is based on this notice of motion and motion, the supporting memorandum of points and authorities and declaration of Brian P. Ballo, the papers and files in this case, and on such other oral and documentary evidence as may be presented at the time of the hearing on this matter.

Any opposition or other response to this motion must

be served on the undersigned and the original and one copy of such papers and proof of service must be filed with the Clerk of the Bankruptcy Court at 940 Front Street, Room 5-N-26, San Diego, California 92189, not later than eleven (11) days before the hearing date.

Respectfully submitted,
Dated: November 19, 1992
LAW OFFICES OF BRIAN P. BALLO

By: /s/ BRIAN P. BALLO
Attorney for Debtor-In-Possession
ELIA NAJOR

APPENDIX B

Brian P. Ballo, Esq., #134892
LAW OFFICES OF BRIAN P. BALLO
12702 Via Cortina, Suite 100
Del Mar, California 92014
(619) 259-5500

Attorney for the Debtor-In-Possession
ELIA NAJOR

FILED
Clerk, U.S. Bankruptcy Court
JAN 5, 1993
Southern District of California
By Deputy

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: Elia Najor, aka Louie Najor, aka Elia M. Najor, Debtor-In-Possession	)	Case 92-08844 H 11 ORDER GRANTING DEBTOR-IN-POSSESSION'S MOTION FOR TURNOVER OF PROPERTY AND CANCELLATION OF BOND

On December 17, 1992 at 10:00 a.m. in Department Three of the above entitled court, Debtor-in-Possession ELIA NAJOR's ("NAJOR") Motion for Turnover of Property and Cancellation of Bond came on regularly for hearing. Brian P. Ballo, Esq. and Gary Rudolph, Esq. appeared for Debtor-in-Possession NAJOR; Donald Schmidt, Esq. appeared for creditor GEORGE ATEEQ ("ATEEQ").

Having read the papers both in favor and against NAJOR's motion, and having heard the oral arguments of counsel, and good cause appearing therefore,

IT IS HEREBY ORDERED:

1. That Bond #DLP0212971, issued by Ranger Insurance Company on April 12, 1991 as undertaking for NAJOR's appeal in *Ateeq et al v. Najor et al.* San Diego Superior Court Case No. 599758, be and hereby is cancelled; and

2. That pursuant to Bankruptcy Code 542(a), the collateral which NAJOR posted for the bond shall be turned over to the bankruptcy estate as follows:

a) The $300,000.00 cash, plus interest, controlled by Douglas Financial Corporation and Ranger Insurance Company (including the 1992 bond premium of $13,490.00) and held by Grossmont Bank ($286,581.35, plus interest from August 31, 1992, in Account No. 82921), shall be transferred to an interest bearing, blocked account maintained by Brian P. Ballo, counsel for the Debtor-in-Possession, at San Diego Trust and Savings Bank, separate from the Debtor-in-Possession bank account, that will not be released to any party or person without further order of this court, and;

b) Ranger Insurance Company shall execute a Reconveyance of the $374,000.00 deed of trust on 29 acres of raw land in Victorville, California (APN: 477-421-36-40,-42), and;

3. That Ranger Insurance Company is released from all liability in connection with the bond and the Collateral

Receipt Agreements for the $300,000.00 and the 29 acres dated April 11, 1992, and;

4. That the automatic stay shall be partially lifted so as to permit the state Court of Appeal to render a decision in NAJOR's appeal of *Ateeq, et al v. Najor, et al.* (San Diego Superior Court, Case No. 599758; Court of Appeal, Case No. D014363). The automatic stay, however, shall remain partially in effect so as to prevent creditor ATEEQ from taking any action either prior to or after the decision by the state Court of Appeal, during the pendancy of this bankruptcy case, to collect on the judgment, without further order of this court.

DATED: JAN 05, 1993

/s/ JOHN J. HARGROVE
THE HON. JOHN J. HARGROVE
U.S. BANKRUPTCY COURT JUDGE

APPROVED AS TO FORM:

LAW OFFICES OF DONALD SCHMIDT

By: /s/ DONALD SCHMIDT DATED: 12/22/92
Donald Schmidt, Attorney for
Creditor GEORGE ATEEQ

APPENDIX C

LAW OFFICES OF HAUSMAN & SOSA
Carlos E. Sosa -- CBN 94387
Larry D. Stratton -- CBN 16955
16633 Ventura Boulevard, Suite 1220
Encino, California 91436-1839
Telephone: (818) 789-5100 // (213) 872-0100
Facsimile: (818) 789-5300

Attorney for: RANGER INSURANCE COMPANY

FILED
Clerk, U.S. Bankruptcy Court
NOV 8, 1995
Southern District of California

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re ELIA NAJOR aka LUIE NAJOR aka ELIA M. NAJOR, Debtor,	CASE NO. 92-08844-H11 DECLARATION OF FRANCES V. TREVINO IN OPPOSITION TO MOTION TO SET ASIDE ORDER DATE: NOVEMBER 9, 1995 TIME: 10:00 A.M. COURTROOM 3

DECLARATION OF FRANCES V. TREVINO

I, Frances V. Trevino, declare as follows:

1. I am an employee and Surety Claims Examiner of RANGER INSURANCE COMPANY ("RANGER"), and I have been in that capacity for all times relevant to this

declaration. I have personal knowledge of all matters stated in this declaration. I am a competent adult, and can testify that each and every matter stated herein is true, accurate, and correct.

2. Moreover, I am a custodian of records of RANGER. I have the custody and control of the underwriting and claims file in the above-referenced case, and can testify that each and every document attached to this declaration is a true and correct copy of the original.

3. On about April 1991, RANGER wrote an appeal bond under California Code of Civil Procedure § 917.1 for the defendant ELIA NAJOR ("Debtor"). This bond was written in a case pending before the Superior Court for the County of San Diego, entitled *Ateeq v. Najor*, case number 599758. A true and correct copy of the bond written by RANGER is appended as Exhibit 1.

4. RANGER is a surety authorized to conduct business in the State of California. As part of its underwriting practices, RANGER ordinarily requires that collateral be deposited or otherwise made available to the surety in order to secure any loss RANGER might suffer.

5. In this case, several items of collateral were obtained. The first item was an irrevocable letter of credit drawn on an account at First Western Bank in the amount of $300,000. A true and correct copy of irrevocable letter of credit number 8 is appended as Exhibit 2.

6. In addition, a second deed of trust was presented by the Debtor, in the amount of $374,000, on

certain property owned by the Debtor located on Hesperia Road, in Victorville, California. A true and correct copy of the "Short Form Deed of Trust Assignment of Rents" dated April 12, 1991, which also acted as collateral, is appended hereto as Exhibit 3. This deed of trust was recorded in the San Bernardino County Recorder's Office, as document number 91-156644.

7. RANGER also required, concurrently with the submission of collateral, that the Debtor execute a collateral receipt agreement memorializing the conditions of deposit relative to, in particular, the real property security. A true and correct copy of the "Collateral Receipt and Agreement" is appended as Exhibit 4. That agreement states in pertinent part:

> The collateral security, together with income thereon, is pledged and deposited with Surety as security:
>
> (a) Against any and all liability, loss, costs, damages, expenses, premiums and attorney's fees arising or incurred in connection with the above captioned bond, or any other bond, recognizance, undertaking or other obligation (all of which, together with any continuations and modifications thereof, are hereinafter referred to as bonds), heretofore or hereafter executed, assumed or procured by Surety at the instance or request or on behalf either of Owner of the Principal above named;
>
> . . .

> **Upon receipt of evidence satisfactory to the Surety of its discharge from all liability under such bond(s), including, at the Surety's sole discretion potential claims which may arise during the applicable statute of limitations period, Surety shall, within a reasonable time, return said collateral security and/or the proceeds thereof**, less any deductions pursuant to the terms of this agreement, to Owner or his/her properly designated assignee or successor or interest. THIS RECEIPT MUST BE RETURNED UPON SURRENDER OF THE COLLATERAL SECURITY.
>
> [Bold added]

8. Thereafter, RANGER became aware of the order of January 5, 1993 issued by the United States Bankruptcy Court, Southern District of California in *In re Elia Najor*, case number 92-08844-Hll, which exonerated the appeal bond [Exhibit 1] written by RANGER *and* ordered return of the collateral. A true and correct copy of the order is appended as Exhibit 5. Thereafter, Debtor's counsel, Brian P. Ballo, requested return of the collateral. A true and correct copy of Mr. Ballo's January 13, 1993 letter is appended as Exhibit 6.

9. At this time, RANGER was unaware of any effort by GEORGE ATEEQ to appeal or attack the order.

10. Accordingly, RANGER thereafter returned the collateral in compliance with the court's order. This collateral was, in fact, returned. In addition, the security interest held by

RANGER to the real property that was secured as collateral was reconveyed on or about January 22, 1993. A true and correct copy of the full reconveyance, which was given to the Debtor's counsel, is appended as Exhibit 7. All collateral was returned in compliance with the court's order, and also given the lack of any attack or appeal by the debtor of a January 5, 1993 order.

11. Had RANGER been aware of any future attack by Mr. Ateeq, RANGER would not have acted as it did. But for the deposit of collateral in this case, RANGER would not have written the bond. Moreover, had RANGER known that Mr. Ateeq had intended to attack the aspect of the order exonerating the bond, RANGER would have sought to stay the aspect of the order requiring the return of collateral until the bond liability issues were *finally* resolved. Therefore, the issue of collateral and bond exoneration by the prior court order of January 5, 1993 are directly linked.

Executed this 7th day of November, 1995 in Houston, Texas.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ FRANCES V. TREVINO
Frances V. Trevino, Declarant